No. 12961.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, etc., *et al.*,

Appellant and Respondent,

vs.

CERTAIN PARCELS OF LAND IN THE CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, *et al.*,

Defendants,

and

RECONSTRUCTION FINANCE CORPORATION, ASSIGNEE OF TREASURE COMPANY, THE ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE, HARRY WYNN, HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and MARY S. HAYWARD,

Respondents and Cross-Appellants.

Brief for Reconstruction Finance Corporation, Assignee of Treasure Company, Appellant.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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Brief for Reconstruction Finance Corporation, Assignee of Treasure Company, Appellant.

Jurisdiction.

This appeal is brought from a judgment entered on October 30, 1950, which was rendered by the Honorable Harry C. Westover, Judge of the United States District Court for the Southern District of California, Central Division. The judgment orders distribution of an award

in a condemnation action brought by the United States Government under the authority of the Act of Congress, approved January 22, 1932 (15 U. S. C. 601-617), as amended, and of Public Law 507, 77th Congress, approved March 27, 1942, and pursuant to Executive Order No. 9217, issued by the President of the United States on August 7, 1942, 7 F. R. 6177. The said Acts of Congress and the said Executive Order of the President authorized the Reconstruction Finance Corporation, which in this brief is referred to as "RFC," to acquire, by condemnation, property deemed necessary for military, naval, or other war purposes. In pursuance of this authority, the United States Government, acting for the use of RFC, seized on the 28th day of September, 1942, certain property in Los Angeles County, California, for the purpose of establishing an underground reservoir for the storage and conservation of natural gas in the Los Angeles, California, industrial area to relieve a shortage of gas which would impede the nation's war effort. RFC appears in this appeal solely as assignee of the interest of Treasure Company, a California corporation, in the condemnation award amounting to $194,500.00.[1]

A motion by RFC, as assignee of Treasure Company, to set aside the Findings of Fact, Conclusions of Law and Judgment, and for a new hearing on the distribution of

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[1]The net amount of the award to be distributed is $191,700.00 after deducting the sum of $2,800.00 as costs of a Special Mastership, in accordance with a stipulation of counsel in this case.

the award was denied on December 11, 1950 [R. 183-184]. A Notice of Appeal was filed by RFC, as assignee of Treasure Company, on January 9, 1951 [R. 188-189]. The District Court had jurisdiction of this case under the Act approved March 27, 1942, *supra,* and this Court has jurisdiction to entertain this appeal under 28 U. S. C. 1291.

Questions Presented.

1. Where a condemnation award is made by a jury for the "total working interest" of a lessee under oil and gas leases covering realty on which a producing oil well is located, and where it was stipulated by counsel in open court that the drill site of the well comprised two separate leasehold estates owned by the lessee, and where the whole testimony of valuation was directed toward the projected net profit to be realized by the lessee out of the well, taking into consideration the estimated production, estimated expenses and the total landowners' royalties payable under the two leases, is not the compensation award for the "total working interest" equivalent to an award for the lessee's total leasehold estate in the two leases?

2. Where a final judgment of a state court has adjudicated the respective rights of a lessee and of certain assignees of the lessee in several oil and gas leases and has limited the rights of the assignees to a participating interest in one of the leases comprising

three lots, and where the Federal Government later condemned the lessee's interest in the lease of three lots and also in an adjacent lease comprising four lots, and where in the condemnation proceeding the lessee and the assignees were named co-defendants and evidence was presented by both the Government and by the assignees that the drill site for a producing oil well consisted of both the lease of three lots and the adjacent lease of four lots, and where no evidence was offered as to the separate value of the lessee's interest in each of the two leases and where a condemnation award was made for the lessee's "total working interest" in the producing oil well, are not the respective participating interests of the assignees limited to that distributive share of the total award which is in direct proportion to the area which the one lease of three lots bears to the total area of the drill site comprising seven lots?

3. Where the lessee of certain land whose leasehold interest has become the subject of a condemnation award and one who claims a right in the leasehold by assignment from the lessee are parties litigant in a pending state court action in which their respective rights are to be determined, is it not an improper preempting of jurisdiction on the part of the United States District Court in making distribution of the condemnation award to make a decision involving the ultimate rights of the parties litigant in the state court action?

Statement.

The condemnation award, which is the subject of this appeal, stands for the leasehold interests of RFC's assignor, Treasure Company, in certain oil and gas leases.

RFC's rights, as assignee, exist under an instrument of assignment entitled "Assignment of Rights under Award," which instrument was duly executed and delivered, for a valuable consideration, to RFC on March 2, 1950, by Treasure Company [Treasure Company's Ex. WW, see R. 202; Fdg. XXIII, R. 145] and was duly recorded on March 10, 1950, in Book 32531 at Page 247 of Official Records of the County of Los Angeles, State of California. Thus RFC stands in the shoes of Treasure Company in this appeal and asserts no rights, as a distributee of the award, other than the rights of Treasure Company.

The United States of America, which appeared as a use-plaintiff[2] in the valuation trial in the District Court and as a party intervenor in the proceedings for distribution of the award, appears in this appeal on the grounds that the judgment entered on October 30, 1350, by Judge Westover, which orders distribution of the award, is inconsistent with both the verdict of the jury in this proceeding [R. 63-66] and the judgment upon the said verdict entered on July 13, 1949, by the Honorable Campbell E. Beaumont, Judge of the United States District Court for

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[2]The condemnation proceeding was brought by the United States of America for the Use of RFC, acting in behalf of Defense Plant Corporation, a wholly-owned subsidiary corporation. RFC succeeded to all of the rights, powers and duties of Defense Plant Corporation and assumed all of its obligations and liabilities pursuant to the Act of Congress dated June 30, 1945, 59 Stat. 310.

the Southern District of California, Central Division [R. 67-76]. The United States of America, in prosecuting this appeal, does not represent RFC as a claimant to the award but has no interest adverse to that of RFC.

All of the parties in this appeal, other than the United States of America, are claimants to a share of the award and their respective claims are, in each instance, traceable to the original rights of Treasure Company, as lessee, in oil and gas leases.

The Adamant Company, a corporation, and Walter B. Scoville appear in this appeal as claimants to a share of the award by virtue of their respective assignments of participating royalties [Fdg. XVI, R. 140] in a certain lease known as the "Fletcher Lease" [Adamant, Scoville, Wynn, Ex. "F," R. 1273; R. 202] which was a lease dated March 11, 1933, granted by Edwin N. Fletcher, Jr. and Mary A. Fletcher, his wife, as lessors,[3] to Treasure Company covering Lots 9, 10 and 11 of Block 33, Tract 9809, as recorded in Book 145 at Page 91, *et seq.* of Maps, in the Official Records of Los Angeles County, State of California.

Herschel Bullen, Mary N. Bullen, J. C. Hayward and Mary S. Hayward appear in this appeal as claimants to a share of the award by virtue of their respective assignments of participating royalties made by Walter B. Scoville which constitute a part of the aforesaid royalties

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[3]The Fletcher Lease was a sublease under a Master Community Lease designated as the "Herndon Lease West of Falmouth Avenue." [Adamant, Scoville, Wynn Ex. "A," R. 1272; R. 202.] The Fletchers had acquired an interest in the three lots under a sublease [Adamant, Scoville, Wynn, Ex. "C," R. 1272].

asserted by Walter B. Scoville in the Fletcher Lease [Fdg. XVII, R. 141].

Harry Wynn appears in this appeal as a claimant to a share of the award by virtue of assignments allegedly made directly to him by Treasure Company of participating royalties in certain of its leasehold estates [Fdg. XVI, R. 141; Concl. VI, R. 152], and by virtue of an assignment made to him by Walter B. Scoville [Fdg. XXVI, R. 146].

Joe Seeple is represented in this appeal and was represented in the court below by Leland J. Allen, Esq., who was also counsel for Walter B. Scoville. Mr. Allen stated in open court that Walter B. Scoville and Joe Seeple will adjust their respective interests out of court and, accordingly, the court below made no finding in reference to the respective interests of these two parties [Fdg. XXXI, R. 148].

RFC's assignor, Treasure Company, had been involved in litigation with all of the claimants to the award (except the assignees of Walter B. Scoville) prior to the commencement of the condemnation proceedings [Fdg. III, R. 136]. An action designated as Cause No. 441484 had been filed by Walter B. Scoville, J. O. Seeple, Harry Wynn and The Adamant Company against one G. de Bretteville and Treasure Company in the Superior Court of Los Angeles County, California, in which the plaintiffs sought the issuance of an injunction against Treasure Company, the rendering of an accounting and the appointment of a receiver for Treasure Company. This litigation resulted in a judgment rendered by Judge Joseph W. Vickers, which judgment in this brief will be referred to as the "Vickers' Judgment" [Adamant, Sco-

vile, Wynn, Ex. "E," R. 1273; R. 202]. The Vickers' Judgment was adverse to the plaintiffs and was appealed by them, but the judgment was affirmed by the California State District Court of Appeal, *Scoville, et al. v. de Bretteville, et al.,* 50 Cal. App. 2d 622, 123 P. 2d 616 (1942) [Fdg. IV, R. 137].

The Vickers' Judgment is important in this appeal because the court below has made conclusions of law that the Vickers' Judgment establishes the law to be followed in this proceeding [Concl. I, R. 150] and that by reason of the doctrine of *res judicata* the interests of the parties who are claimants to the award were established by the Vickers' Judgment [Concl. VIII, R. 152].

The Vickers' Judgment involved the construction of a certain written contract dated April 5, 1938, which was entered into between the Treasure Company as First Party, The Adamant Company as Second Party, and Walter B. Scoville as Third Party [Adamant, Scoville, Wynn Ex. "D," R. 1272; R. 202]. Treasure Company held leasehold interests in various oil and gas leases in the Del Rey Hills in Los Angeles County and the said contract pertained to a proposed drilling program by the parties involving the aforesaid Fletcher Lease, a lease known as "Burns Lease No. 1" [Adamant, Scoville, Wynn Ex. "G," R. 1273; R. 202], a lease designated as "Burns Lease No. 2," and a lease designated as "Burns Lease No. 3."[4]

Prior to the execution of the said contract, Treasure Company had endeavored to drill an oil well known as

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[4]"Burns Lease No. 2" and "Burns Lease No. 3" are not involved in this litigation.

"Treasure Well #8" (which in this brief is referred to as "Treasure Well") on the Fletcher Lease but could not complete the undertaking because of financial difficulties [Fdg. II, R. 136]. The contract provided that funds were to be furnished by The Adamant Company for the completion of the well.

The respective rights of the parties under the said contract became a subject of dispute which gave rise to the litigation resulting in the Vickers' Judgment [Fdg. III, R. 136].

One of the holdings of the Vickers' Judgment was that the plaintiffs in the action, The Adamant Company, Walter B. Scoville and their assigns, lost as of January 31, 1939, their respective interests under the contract in all leaseholds described in the contract, other than the leasehold interest on which Treasure Well was located.

Paragraph 1 of the Vickers' Judgment particularly describes the lease upon which Treasure Well is situated as follows:

> "All that real property in the City of and County of Los Angeles, State of California, known as Lots 9, 10 and 11 of Block 33, in Tract 9809, as per map recorded in Book 145, Page 91, *et seq.* of Maps, Records of said Los Angeles County, California." [Fdg. XII, R. 139.]

Paragraph 3 of the Vickers' Judgment states that the contract was terminated as of January 31, 1939, "save and except that the plaintiffs, The Adamant Company and Walter B. Scoville and their assigns, are entitled to retain their respective interests in said lease hereinbefore described upon which said well 'Treasure No. 8' is drilled,

to-wit: Twenty-five per cent (25%) therein to The Adamant Company, a corporation, and Nineteen per cent (19%) therein to Walter B. Scoville, both of which interests are subject to any assignments made, and subject to their pro rata share of the completion, operating and maintenance costs and charges of said well." [Adamant, Scoville, Wynn Ex. "E," R. 1273; R. 202.]

The question of the payment of the completion, operating and maintenance costs and charges of Treasure Well and the parties responsible for such payment is now pending in a collateral accounting action in another department of the United States District Court for the Southern District of California and Judge Westover made no Findings of Fact in reference to the same [Fdg. XXXVI, R. 150].

The complaint filed by the United States Government in this suit named Treasure Company, The Adamant Company, Walter B. Scoville, Harry Wynn, Joe Seeple, Herschel Bullen, Mary N. Bullen, J. C. Hayward and Marion S. Hayward, as co-defendants [R. 3].

Treasure Company filed a separate answer claiming damages for its leasehold estate in the Fletcher Lease, the Burns Lease No. 1, the Burns Lease No. 2, and the Burns Lease No. 3, in the aggregate amount of $2,000,000.00 [R. 35-52]. However, negotiations were commenced by the Government with Treasure Company for the settlement of all of its claims prior to the commencement of the trial and as a result of these negotiations, Treasure Company did not actually participate in the valuation trial. RFC, as assignee of Treasure Company, entered its appearance and did participate in the hearings before Judge Westover involving the distribution of the award.

Notwithstanding the holdings of the Vickers' Judgment,[5] The Adamant Company, Walter B. Scoville and Harry Wynn filed a joint answer to the complaint in condemnation on December 8, 1943, in which The Adamant Company alleged ownership of a 25% participating royalty interest in the Fletcher Lease, the Burns No. 1 Lease, the Burns No. 2 Lease and the Burns No. 3 Lease [R. 14-17], and Walter B. Scoville alleged an ownership of 19% participating royalty interest in all four of said leases, admitting that he had assigned 1% of his ownership to Herschel Bullen and wife, and 1% to J. S. Hayward and wife [R. 20]. Harry Wynn alleged, in the joint answer, a 5% participating royalty interest in the Fletcher Lease and in the Burns No. 1 Lease [R. 22].

The jury trial to determine the value of the lessee's interest under the Fletcher Lease and the Burns No. 1 Lease commenced on April 19, 1949, and during the trial settlement was made by the Government with the respective landowners of both the Fletcher Lease and the Burns No. 1 Lease, so that the question of the value of the lessors' residual interest was taken from the jury, leaving for the determination of the jury the value of the lessee's interest in the Fletcher leasehold and in the Burns No. 1 leasehold [R. 210; Fdg. VII, R. 138].

The jury trial before Judge Beaumont in no way concerned itself with the Vickers' Judgment,[6] inasmuch as the issue before the jury was the valuation of the lessee's

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[5]The petition of The Adamant Company, Walter B. Scoville and Harry Wynn for distribution of the award alleges that the Vickers' Judgment became final on May 20, 1942 [R. 82].

[6]The Vickers' Judgment was mentioned incidentally in argument [R. 1079, 1104].

interest in the two leaseholds and the question of the distribution of the award as between the several co-defendants was not placed before the jury [R. 1073].

The Government introduced a large map as an exhibit [Pltf. Ex. 1, R. 1272 and R. 1276] which reflected the various parcels included in the several leaseholds which had been seized. The Fletcher Lease was designated as "H" on the map by plaintiff's witness, Dr. John F. Dodge [R. 287], and the Fletcher Lease was identified on the map in orange color [R. 308].

The symbol "G" on Plaintiff's Exhibit 1, designated the landowners' royalties under the Master Community Lease known as the "Herndon Lease West of Falmouth Avenue" [R. 283-284] and the entire Herndon Master Community Lease was colored in bluish green [R. 283]. Various subleases under the Herndon Master Community Lease were designated on Plaintiff's Exhibit 1 as "G-1," "G-2," and "G-3" [R. 284, 285]. The symbol "G-3" on Plaintiff's Exhibit 1, designated the landowners' royalty in the Burns Lease No. 1 containing the four lots which were joined with the three lots of the Fletcher Lease to comprise the drill site for Treasure Well, and these four lots, to-wit: Nos. 7 and 8, 35 and 36, of Block 33, were identified on the map by a brownish-orange color [R. 285, 286]. Dr. Dodge explained that it was unnecessary for him to give a valuation for the parcel designated "G-3" (landowners' royalties), inasmuch as "G-3" was part of the larger parcel "G" and he had previously given a valuation for the larger parcel "G"[7] [R. 287].

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[7]The value of the lessors' interest designated as parcel "G" was settled out of court.

Dr. Dodge testified that Treasure Well was drilled on the Fletcher Lease which had been identified as parcel "H," but that it was subject to a royalty interest accruing both to the landlords under the Fletcher Lease and to the landlords under the Herndon Master Community Lease, and he was asked by the attorney for the Government what in his opinion was the value of the total working interest in Treasure Well. Dr. Dodge replied that the total working interest under conditions of total royalty amounting to 28.7%,[8] consisting of 16.67% to the Fletcher landlords and 12.03% to the Herndon Master Community Lease (through the Burns No. 1 sublease) was $150,-830.00 [R. 306, 307]. Before the witness explained in detail his definition of working interest, he marked upon Plaintiff's Exhibit 1, at the request of counsel for the Government, the symbol "H-1, W. I." to designate the value which he was assigning to the working interest in Treasure Well [R. 307]. The court admonished the witness that he had drawn the symbol so that it came down to the orange part on the map and asked him what he intended to do, and the witness replied: "Draw it to the well because it is only an interest in the profits from the well and does not attach to the land" [R. 308].

One of the principal issues in this appeal is the dispute among the claimants to the award as to what was the ac-

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[8]For purposes of determining the prospective net profits of Treasure Well during its anticipated life, after deduction of estimated expenses and landowners' royalties, it was subsequently stipulated that the figure 28.7% total royalties, was not correct. The Fletcher Lease royalty was agreed to have been 7.365% and the Burns Lease No. 1 was agreed to have been 12.03%, making a total royalty of 19.395%. Counsel stipulated that the total royalties would be considered as 19.4% [R. 746].

tual significance of the symbol "H-1, W. I." which the jury was requested to evaluate.

One of the defendants in the valuation trial, C. F. Johnson,[9] appearing *in pro. personam,* stated that it was not clear to him as to whether the valuation figure of $150,830.00 applied to the landowners' royalty and overriding royalties or to the value of what was left after they were taken out [R. 308]. Dr. Dodge replied that the value of $150,830.00 [which he has designated as "H-1, W. I."] was reached after the landowners' royalty of 12.03% and 16.67% were taken out and represented the profits which accrue to the operators of the well [R. 309]. After further elucidation, Judge Beaumont summed up the statements of Dr. Dodge, saying: "It is just when an operator desires to lease property for the purpose of operating and they enter into a lease, the landowner gets a certain percentage, the operator drills the well, takes chances on finding oil, and then what he makes out of the rest of it is his" [R. 310]. The witness agreed with the court's conclusion.

It should be noted that the concept of a "working interest" was also used in connection with the evaluation of other parcels involved in the condemnation but not involved in this appeal. Dr. Dodge testified with respect to another oil well known as well "Herndon 29-2" that the working interest designated as "G-1, W. I." was arrived at on the basis of money profit to be derived from the well [R. 332].

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[9]The claim of the defendant Johnson was settled by the Government out of court prior to the verdict of the jury.

Under cross-examination, Dr. Dodge was asked if the figure of $150,830.00 for the working interest in Treasure Well was based upon prospective operating profits and he answered: "That is correct; it is based upon approximately a 17-year life, a total future recovery of close to 350,000 barrels of oil, as a matter of fact 344,800 barrels of oil and accompanying gas and gasoline * * *" [R. 333]. Dr. Dodge, still on cross-examination, further testified that his definition of "working interest" presupposed a net recovery in the operation of a well after payment of the operating expenses and subject to the payment of the landowners' royalties [R. 343].

The Government introduced a second expert witness, Mr. Harry P. Stolz, who stated that he was familiar with the Plaintiff's Exhibit 1 and was familiar with the various markings that Dr. Dodge had made thereon [R. 384]. He assigned a valuation for the working interest of Treasure Well at $97,029.00 [R. 397].

Robert S. Burns, one of the landlords of the Burns Lease No. 1, was called as a witness by the Government and on direct examination testified that Lots 7, 8, 35 and 36 of Block 33 were subleased to Treasure Oil Company to be joined with Lots 9, 10 and 11 in Block 33 to make up the drill site of one acre for Treasure Well No. 8 [R. 719-720].

Dr. Robin Willis was the principal expert witness for the defendants, The Adamant Company, Walter B. Scoville, and Harry Wynn. His testimony on direct examination did not follow the theory of Dr. Dodge and of Mr. Stolz in evaluating the working interest of Treasure Well, but instead was addressed to the fair market value of the entire mineral estate. The court felt that this di-

vergence of methods of evaluation would be confusing to the jury and on several occasions requested that counsel have their respective expert witnesses testify on some agreed upon basis of evaluation [R. 605, 622, 665].

Ultimately, there was agreement between counsel for the Government and counsel for the defendants on the methods to be used by the witnesses in evaluating the leasehold interests of the lessee and a ruling of the court was obtained [R. 746]. The witnesses Dodge, Stolz and Willis returned to the stand to revise their valuations on the basis of "total working interests" in Treasure Well, using the agreed upon landowners' royalty of 19.4% [R. 758, 779, 885].

The jury was thereupon instructed by Judge Beaumont that "your verdict as to the parcel designated 'H-1, W. I.' must be predicated on the assumption that the royalty payable from the production of Treasure No. 8 well is 19.4% and not 28.7%" [R. 1165]. The verdict of the jury for "H-1, W. I.," being the total working interest in Treasure Well No. 8, was $194,500.00 [R. 65]. On July 13, 1949, Judge Beaumont entered judgment upon the verdict ordering the United States of America to pay out of the funds previously deposited in the registry of the court for "(H-1, W. I.) total working interests in Treasure Company well No. 8, $194,500.00" [R. 67-79].

There was no appeal from the judgment entered by Judge Beaumont which retained jurisdiction for purposes of apportioning and distributing the award. Subsequently, Judge Beaumont was assigned to another Division of the District Court and the cause was thereupon transferred to Judge Westover.

On February 4, 1950, The Adamant Company, Walter B. Scoville and Harry Wynn filed a petition for distribution of the award [R. 79-94], in which The Adamant Company claimed $60,328.75, with interest, Walter B. Scoville claimed $41,023.55, with interest, and Harry Wynn claimed $14,478.90, with interest.

On February 11, 1950, Joe Seeple filed a petition for distribution [R. 96-100] claiming $41,023.55, with interest. The petition of Joe Seeple alleged in paragraph 2 that he had acquired a nineteen 1% working interest in Treasure Well and "that said working interests were taken in the name of Walter B. Scoville by mutual consent of Petitioner and said Walter B. Scoville" [R. 97].

On February 14, 1950, Herschel Bullen, Mary N. Bullen, his wife, J. C. Hayward and Mary S. Hayward, his wife, filed a petition for distribution [R. 101-125] in which they claimed the sum of $10,000.00, with interest, plus the additional sum of $4,826.30 with interest, plus a further indeterminate amount to be established by an accounting.

Hearings were commenced before Judge Westover on May 11, 1950, for the purpose of determining the distribution of the award. RFC, as assignee of Treasure Company, filed no petition for distribution but entered its appearance in the hearings before Judge Westover as assignee of Treasure Company and a claimant to a share of the award.

At the conclusion of the hearings, Judge Westover handed down a Memorandum of Decision and requested counsel for The Adamant Company, Walter B. Scoville and Harry Wynn to prepare Findings of Fact and Conclusions of Law, in accordance therewith, for the approval

of the court. Hearings were thereupon held on the proposed Findings and Conclusions and on October 30, 1950, Judge Westover filed his Findings of Fact and Conclusions of Law [R. 134-153] and entered judgment in accordance therewith.

Judge Westover found, *inter alia,* that the symbol "H-1, W. I." was indicated on the map, Plaintiffs' Exhibit 1, as referring to Lots 9, 10 and 11, of Block 33, Tract 9809, which is the Fletcher Lease [Fdg. X, R. 139]; that in the jury trial the Fletcher Lease was referred to and described as "H-1, W. I." and that the jury's verdict of $194,500.00 for "H-1, W. I." fixed the value of the leasehold interest in the property on which Treasure Well was drilled, and that the award was not intended and was not made for oil produced, saved and sold or to be produced, saved and sold from the leasehold, nor was it limited to the value of Treasure Well No. 8 [Fdg. IX, R. 138, 139]; that the jury's verdict established the value of the lessee's interest in the Fletcher Lease on which Treasure Well No. 8 was located [Fdg. XIV, R. 140]; that the leasehold containing the well, Treasure No. 8, is the leasehold of the Fletcher Lease and does not include the Burns No. 1 Lease [Fdg. XV, R. 140]; that the monies due to all of the parties in this action are due because of their respective interests in the leasehold known as the "Fletcher Leasehold" [Fdg. XXIX, R. 147]; that this action was filed to condemn land and personal property, and that the jury's verdict of $194,500.00 fixed the value of the Fletcher Leasehold upon which Treasure Well No. 8 was drilled [Fdg. XXXV, R. 149-150]; and that there is an action pending in the Superior Court of Los Angeles County between Harry Wynn and Treasure Company with respect to which the court made no find-

ings, the merits of said action and the rights to bring the same being immaterial to the issues of this case [Fdg. XXXVI, R. 150].

Judge Westover made a Conclusion of Law that the rights of The Adamant Company and Walter B. Scoville to the award were controlled by the Vickers' Judgment [Concl. IV, R. 151]; that Harry Wynn held valid assignments from Treasure Company totalling 5% royalty interest [Concl. V, VI, R. 152]; and accordingly, in his judgment, he apportioned the remaining balance of the award in the amount of $191,700.00 as follows:

Reconstruction Finance Corporation, 51 per cent, or the sum of	$97,767.00
Adamant Company, 25 per cent, or the sum of	47,925.00
Walter B. Scoville, 16 per cent, or the sum of	30,672.00
Harry Wynn, 6 per cent, or the sum of	11,502.00
H. Bullen and Mary N. Bullen, 1 per cent, or the sum of	1,917.00
J. C. Hayward and Marion S. Hayward, 1 per cent, or the sum of	1,917.00

[R. 155].

On November 9, 1950, The Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn filed a motion to vacate the judgment and for a new trial of the cause

[R. 158-168]. This motion was supported by the following arguments, *inter alia:*

1. "The evidence is sufficient to establish the Finding No. XIV that 'the Jury's verdict of $194,500.00 established the value of the lessee's interest in the Fletcher Lease, Lots 9, 10 and 11, Block 33, Tract 9809, on which Treasure Well No. 8 was located,' *and the evidence is also sufficient to establish the value of the lessee's interest in the entire leasehold comprised of 7 lots,* upon the grounds that the only value of the leasehold was the value of the working interests in Treasure Well No. 8 (except, of course, the landowner's fee title and landowner's royalty—which was withdrawn from the jury by the plaintiff)" [R. 159-160]. (Emphasis added.)

2. "The said Contract (contract of April 5, 1938) created a joint venture in which the Treasure Company held the title to all of said leases for the benefit of itself, The Adamant Company and Walter B. Scoville, and even though the Vickers' Judgment rules that said contract was terminated, said case cannot divest The Adamant Company and Scoville of their interests in the Burns' Leases, nor change the fact that Treasure Company held the title as lessee for the joint adventure and the joint benefit of The Adamant Company and Walter B. Scoville and itself" [R. 160].

3. "The evidence is insufficient to sustain the latter part of Finding XXXIII, reading as follows: 'Neither The Adamant Company, nor Walter B. Scoville re-

tained any interest whatsoever in the Burns No. 1 Lease, nor in the Burns No. 2 Lease, nor in the Burns No. 3 Lease.'

"Under the contract of April 5, 1938, and the Vickers' Judgment these parties did not lose their property rights in these leases but only the right of management.

"The Vickers' Judgment exceeds its jurisdiction in any attempt to terminate those interests.

"The plaintiff in the present action was not a party to the Vickers' accounting case.

"The contract of April 5, 1938 is still existent as to these claimants' property rights in the leaseholds and such contract is not merged into the Vickers' Judgment." [R. 167-168].

Motions to vacate the judgment and for a new hearing on the distribution were also filed by the United States of America as a party intervenor on November 10, 1951 [R. 174-181], and by Herschel Bullen and Mary N. Bullen, his wife, and J. C. Hayward and Mary S. Hayward, his wife, on November 7, 1950 [R. 156-157].

A motion to set aside the Findings of Fact, Conclusions of Law and Judgment and for a new hearing was also filed by RFC, as assignee of Treasure Company, on November 9, 1950 [R. 168-174]. In support of this motion, RFC, as assignee of Treasure Company, argued, *inter alia,* that the evidence in the jury trial establishes that the award of $194,500.00 stands for Treasure Company's interest as lessee in the seven lots comprising the Fletcher

Lease and the Burns No. 1 Lease, and that inasmuch as the rights of The Adamant Company, Walter B. Scoville and their assigns to the award are relegated under the Vickers' Judgment to the Fletcher Lease alone, the court should have ordered distribution of the net balance of the award as follows:

To the Adamant Company, 25% of 3/7 of $191,700.00;

To Walter B. Scoville, and his assigns, 19% of 3/7 of $191,700.00;

To RFC, as assignee of Treasure Company, the remainder of the net award.

All of the respective motions for the vacation of the judgment and for a new hearing were denied by Judge Westover on December 11, 1950 [R. 183-184] and RFC, as assignee of Treasure Company, thereupon filed this appeal.

Specifications of Error.

The District Court was in error:

(1) In refusing to vacate its judgment entered October 30, 1950; and in refusing to vacate its findings IX [R. 138], X [R. 139], XIV [R. 140], XV [R.140], XIX [R. 143], XXI [R. 143], (erroneously designated in the Record as "XI"), XXIX [R. 147] and XXXVI [R. 150], upon which the judgment was based XXXV [R. 149]; in refusing to vacate its conclusions of law V [R. 152], VI [R. 152] and X [R. 153], upon which the

judgment was based; and in refusing to make the following findings and conclusions of law proposed by RFC, to-wit: RFC's proposed findings VIII [R. 1287], IX [R. 1290], X [R. 1292], XIV [R. 1292], XX [R. 1292] and XXIX [R. 1293], and RFC's proposed conclusion of law X [R. 1294].

(2) In ordering distribution of the award of $194,-500.00 on the basis of findings that the monies due to the claimants are due because of their respective interests in the Fletcher Lease alone.

(3) In refusing to order distribution in accordance with the jury's verdict that the award of $194,500.00 for "H-1, W. I., the total working interest in Treasure Well No. 8," was for the lessee's interest in a common drill site comprised of both the Fletcher Lease and the Burns No. 1 Lease and in refusing to apportion the award to The Adamant Company, Walter B. Scoville and his assigns, on the basis of their respective participating interests in only three lots of the seven lots which were condemned.

(4) In holding that Harry Wynn is the owner of two separate 2½% participating interests in the property for which the award stands by reason of certain assignments which were made or should have been made by Treasure Company to said Harry Wynn.

ARGUMENT.

I.

The Award of $194,500.00 by the Jury in the Valuation Trial Was for "H-1, W. I., Being the Total Working Interest in Treasure Well No. 8" and This Award Stands for the Lessee's Interest in Both the Fletcher Lease and the Burns No. 1 Lease Which Together Comprise the Total Drill-Site for Treasure Well.

Judge Westover in the distribution proceeding was clearly in error in holding that the jury awarded the sum of $194,500.00 for the lessee's interest in the Fletcher Lease alone. There is no evidence in the record of the valuation trial to support this conclusion and, on the contrary, the evidence is overwhelming that the award was made for the lessee's interest in both the Fletcher Lease and the Burns No. 1 Lease.

At no time during the valuation trial was there any dispute between the Government, as plaintiff, and the several co-defendants as to the area of the lease-hold for which damages were sought. The fact is there was an absolute unanimity of opinion that the area of the Treasure Well No. 8 drill-site comprised the two leases and the following considerations establish this conclusively:

(a) Witnesses for the Government testified that the leasehold for Treasure Well is made up of three lots comprising the Fletcher Lease and four lots comprising the Burns No. 1 Lease. There was no testimony offered by any of the co-defendants to refute this.

Thus the Government's principal witness, Dr. John F. Dodge, identified the seven lots making up

the leasehold as Lots 9, 10 and 11 of the "Fletcher Parcel" and Lots 7, 8, 35 and 36, which during the trial had been "labeled G-3" [R. 352-353]. He had previously testified that the Fletcher Lease was united with certain other lots by Treasure Company as a drill-site for Treasure Well [R. 306-308].

This testimony was corroborated by testimony of the Government's witness, Robert S. Burns [R. 719-720].

(b) The witness, Dodge, testified that under the law of California the minimum legal drill-site for an oil well was one acre [R. 350, 352] and no testimony was offered by the co-defendants to refute this. It was, instead, corroborated by statements which counsel for the co-defendants made to the court [R. 735, 738].

(c) Witnesses for both the Government and the co-defendants testified that the leasehold to be valued by the jury was approximately an acre in size and counsel for the co-defendants, in the presence of the jury, stated this to be a fact.

The witness, Dodge, referred to the area of the leasehold as "slightly under 50,000 square feet" [R. 352] and also described it as an acre [R. 306, 350].

The witness, Burns, stated that seven lots made up a drill-site for Treasure Well of an acre [R. 719-720].

The witness, Robin Willis, who testified for the co-defendants, was in accord [R. 650] and so was the defendant, Harry Wynn, who took the stand [R. 698].

Counsel for the co-defendants made various references to the "one acre" drill-site both in the presence of the jury [R. 579, 703] and during argument [R. 738].

An examination of the legal description in the Fletcher Lease [Adamant, Scoville, Wynn Ex. "F," R. 1273; see R. 202] discloses that it covers approximately 20,025 square feet or less than half an acre. However, the area of the Burns No. 1 Lease [Adamant, Scoville, Wynn Ex."G," R. 1273] is about 25,785 square feet so that the total area of the combined leases is some 45,810 square feet or slightly more than an acre.

(d) The large colored map [Deft. Ex. "S," R. 700; see R. 1276], introduced by the co-defendants as demonstrative evidence and exhibited to the jury was referred to by witnesses for both sides and the area on the map in purple color was identified by these witnesses as the one acre drill-site of Treasure Well comprising both the Fletcher Lease and the Burns No. 1 Lease.

The witness, Wynn, along this vein, testified that "The purple area consists of the one-acre drill-site on which Treasure Well is now located" [R. 698] and the court instructed the witness to take a pointer and outline the purple area on the map for the benefit of the jury.

On cross-examination the witness, Dodge, examined the map and admitted that the purple area represented the Treasure Well leasehold [R. 828].

(e) Documentary evidence containing the respective legal descriptions of the Fletcher Lease and of the

Burns Lease No. 1 was exhibited to a witness for the Government and also to a witness for the co-defendants and each witness testified that the two legal descriptions embraced the Treasure Well drill-site.

Defendant Johnson's Exhibit "A" for identification [R. 1273] was shown to the witness, Dodge. It contains four paragraphs of legal descriptions and he was asked on direct examination whether or not the first two smaller paragraphs alone relate to the acre upon which Treasure Well is drilled. The witness answered "Yes. That is correct, the first two. The first paragraph contains Lots 9, 10 and 11 and refers to the so-called Fletcher Parcel which has been labeled H.[10] The next paragraph includes Lots 7, 8, 35 and 36 and refers to the four additional lots which I believe have been labeled G-3,[11] if I am not mistaken."

Defendant's Exhibit "K" [R. 1273] was shown to the witness Wynn. It contains legal descriptions in three separate paragraphs, the first being the description of both the Fletcher Lease and the Burns No. 1 Lease. The witness testified that "Parcel 1 includes the area for the Treasure Well; Parcels 2 and 3 cover the red and green" [R. 700]. [12]

(f) Counsel for the co-defendants entered into a stipulation with counsel for the Government under the terms of which the expert witnesses for both sides

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[10]"H" was a parcel designation for the Fletcher Lease on Plaintiff's Ex. 1 [R. 287].

[11]"G-3" was a parcel designation for the lessor's interest in the Burns No. 1 Lease [R. 285-286].

[12]The witness was referring to Defendant's Exhibit "S," a map on which the Treasure Well leasehold was colored purple.

were required to reevaluate the leasehold estate of the Treasure Well drill-site on the basis of a total landowners' royalty of 19.4% of which 7.365 was apportioned to the Fletcher Lease and 12.03% was apportioned to the Burns Lease No. 1 [R. 743-746]. This stipulation was made a ruling of the court [R. 746]. In the light of this ruling, it would have been not only meaningless but highly improper if the jury had been requested to render a verdict on the value of the lessee's interest in the Fletcher Lease alone.

(g) The verified pleadings filed by The Adamant Company, Walter B. Scoville and Harry Wynn, contain admissions by these co-defendants that the drill-site for Treasure Well is located on both the Fletcher Lease and the Burns No. 1 Lease and compensation for the seizure of both leasehold interests was accordingly demanded by them in such pleadings [R. 23, 55].

The joint answer filed by these parties on December 8, 1943 contains in paragraph V a clear statement that Treasure Well is located upon a drill-site composed of the two leaseholds [R. 16] and similar statements were contained in paragraph IV of their Petition for Partial Distribution of Compensation in Condemnation filed on March 15, 1944 [R. 26] and in paragraph IV of their subsequent Petition for Partial Distribution of Compensation in Condemnation filed on April 22, 1947 [R. 58].

It is submitted that the above considerations establish beyond all doubt that the area of the leasehold, the value of which was submitted to the jury, embraced the three

lots of the Fletcher Lease and the four lots of the Burns No. 1 Lease and that, on this score, there was no dispute whatever in the valuation trial.

Judge Westover in the distribution proceeding was clearly in error in finding that the symbol "H-1, W. I." as indicated on the map, Plaintiff's Exhibit 1, referred only to the three lots of the Fletcher Lease [Fdg. X, R. 139].

The three lots of the Fletcher Lease were designated on Plaintiff's Exhibit 1 as "Parcel H" [R. 287].

"H-1, W. I." was a symbol representing the "working interest" of the lessee in Treasure Well—the anticipated profit to the lessee to be derived in working the leasehold, taking into consideration the potential production, the estimated operating expenses and the burden of landowners' royalties [R. 307-310, 332-333, 343].

Obviously, the Government had not condemned as such the lessee's right to make a money profit from the operation of an oil well, nor had it condemned potential oil in place, in the sense that such oil was severable from the land. What the Government has condemned was land, including a leasehold interest in the land, and because it was considered both a feasible and pragmatic approach in the evaluation of the fair market value of the lessee's interest, expert witnesses for both sides testified as to the value of the "total working interest," taking into account the stipulated landowners' total royalties (on the seven lots) which the lessee would have had to pay had the property not been condemned.

"H-1, W. I." was therefore a symbol representing the total working interest of the lessee in the Fletcher Lease and the Burns No. 1 Lease and, as incorporated into the jury's verdict, it stands for the value which the jury placed upon the lessee's interest in both leases.

II.

The Adamant Company Is Entitled to No More Than 25% of 3/7 of the Net Balance of the Award and Walter B. Scoville and His Assigns Are Entitled to No More Than 19% of 3/7 of the Net Balance of the Award.

Judge Westover was correct in finding and concluding that the rights of The Adamant Company and of Walter B. Scoville under the agreement dated April 5, 1938 were merged into the Vickers' Judgment [Concl. IV, R. 151]; that the Vickers' Judgment was affirmed on appeal and has become final [Fdg. IV, R. 137]; that under the Vickers' Judgment The Adamant Company retained a 25% participating royalty interest in the Fletcher Lease alone and Walter B. Scoville retained a 19% participating royalty interest in the Fletcher Lease alone, neither The Adamant Company nor Walter B. Scoville having retained any interest whatever in the Burns Lease No. 1, nor in the Burns Leases No. 2 and No. 3 [Fdg. XXXIII, R. 149]; and that by reason of the doctrine of *res judicata* the interests of the claimants to the award in the distribution proceeding were established by the Vickers' Judgment [Concl. VIII, R. 152-153].

Thus, if Judge Westover had not erred in holding that the jury award in the valuation trial stands for the lessee's interest in the three lots of the Fletcher Lease alone, he would undoubtedly have applied the ruling of the Vickers' Judgment to an award for seven lots and would have ordered an apportionment in accordance with the request of RFC, as assignee.

If, as RFC contends, the net balance of the award stands for the lessee's interest in a total of seven lots

(which are of approximately equal size), it follows that the Vickers' Judgment entitles The Adamant Company to no more than 25% of that part of the award which represents the lessee's interest in the three lots of the Fletcher Lease or 25% of 3/7 of the net balance of the award; and similarly it follows that the Vickers' Judgment entitles Walter B. Scoville and his assigns to no more than 19% of 3/7 of the net balance of the award.

It should be noted that neither The Adamant Company nor Walter B. Scoville have designated as grounds for their appeal to this Court the findings and conclusions of Judge Westover on which he held that their rights to distribution of the award are defined by the Vicker's Judgment. Although at one point in the proceedings before Judge Westover counsel for these claimants attacked the Vickers' Judgment and argued that their rights under the agreement dated April 5, 1938 were not terminated nor merged into Vickers' Judgment [R. 160, 168], this tactic was, in effect, an effort to impeach their own evidence inasmuch as the findings of fact, conclusions of law and the judgment constituting the Vickers' Judgment were introduced at the Valuation Trial as "Adamant, Scoville, Wynn Exhibit E" with this statement by their counsel: "This is the complete findings and judgment in that case, *which defines the interests of The Adamant Company and Scoville*" [R. 449]. (Italics added.) In this connection, it should also be noted that the petition for distribution of the award filed by The Adamant Company, Walter B. Scoville and Harry Wynn [R. 79-95] not only recites the Vickers' Judgment as the basis of their respective claims but asserts that on May 20, 1942 the Vickers' Judgment became final.

III.

The District Court Should Not Have Preempted the Jurisdiction of the California State Court in Determining the Ownership Rights of Harry Wynn in the Property Condemned for Which the Condemnation Award Stands.

Judge Westover made a finding of fact as a result of the distribution hearing to the effect that there was presently an action pending in the Superior Court of the County of Los Angeles, Docket 486327, between Harry Wynn and Treasure Company and G. de Bretteville. In the same finding [Fdg. XXXVI, R. 150], Judge Westover was scrupulously careful to avoid making any decision as to the effect of the action in the California State Court or its merits, saying: "That the question of the merits of said action and the rights to bring same is immaterial to the issues in this case." Interestingly enough, Judge Westover had, by virtue of his conclusions of law, determined that Harry Wynn was entitled to 6% of the total award [See Concl. X, R. 153] and had expressly found that Harry Wynn's interest arose by assignment, and that a state court execution against any interest in Treasure Company which Harry Wynn might have was ineffective [Fdg. XI, R. 143]. Judge Westover concluded that the sale under execution of Harry Wynn's interest was ineffective [Concl. V, R. 152; See Concl. IV and VI, R. 151, 152].

Admittedly, in any condemnation case, where rival claims to a fund have been filed, a claimant is regarded as a plaintiff in respect to his own claim and as a defendant in respect to the claim of his rival or rivals. *United States v. Hoblitzell,* 2 Fed. Supp. 832 (D. Va. 1932). However, one of the fundamental principles

of the concurrent system of justice in the United States is that a comity will exist between the Federal and the State Courts. As stated by Mr. Justice Sutherland in *Kline v. Burke Construction Co.,* 260 U. S. 226, at page 229 (1922): "It is settled that where a Federal Court has first acquired jurisdiction of the subject-matter of a cause it may enjoin the parties from proceeding in a State Court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the Federal Court. Where the action is *in rem* the effect is to draw to the Federal Court the possession or control, actual or potential of the *res,* and the exercise by the State Court of jurisdiction over the same *res* necessarily impairs and may defeat the jurisdiction of the Federal Court already attached. The converse of the rule is equally true, that where the jurisdiction of the State Court has first attached, the Federal Court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the State Court's jurisdiction." See *Covell v. Heyman,* 111 U. S. 176 (1884); accord *Hagen v. Lucas,* 10 Pet. 400 (1836).

It has always seemed clear that jurisdiction already assumed and exercised under state law, by a State Court, is not subject to collateral attack in a Federal District Court. *General Exporting Co. v. Star Transfer Lines,* 136 F. 2d 329 (C. C. A. 6th, 1943). This was apparently the feeling which Judge Beaumont had during the valuation trial, as is shown by his comments [R. 752-753]. In fact, Judge Beaumont was of the opinion that the interest claimed by Wynn should be withdrawn from the condemnation proceeding until there had been a determination of his rights in the State Court [R. 850-851].

The foregoing rule has been frequently declared inapplicable to *in personam* proceedings, but even in such proceedings the matter of assuming jurisdiction is within the discretion of the Federal Courts. In a case under the Federal Declaratory Judgment Act, the Supreme Court in *Brillhart v. Excess Ins. Co.,* 316 U. S. 491 (1942), declared that the petitioner's motion to dismiss the bill for declaratory relief on an insurance question was addressed to the discretion of the court, even though there was no question but that the Federal Court would have jurisdiction of the matter, in spite of the previously filed State Court litigation. The now famous words were there uttered at page 495:

> "Gratuitous interference with the orderly and comprehensive disposition of a State Court litigation should be avoided.
>
> "Where a District Court is presented with a claim such as was made here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the State Court. This may entail inquiry into the scope of the pending State Court proceeding and the nature of the defenses open there. The Federal Court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc."

It should be observed that Judge Westover at the time of the distribution hearing made no investigation of the merits of the State Court proceeding involving Wynn, Treasure Company and G. de Bretteville. His reasoning, apparently was that these matters were entirely immaterial to a distribution of the award. This would seem unsound, for the rights of the parties entitled to the award were necessarily dependent upon a decision to be rendered by the State court. To supply this deficiency, Judge Westover in the same findings of fact in which he had already declared the position of the parties in the State Court proceeding immaterial, found validity and enforceability in the asserted rights of Harry Wynn.

Again, even though rights *in personam* are considered external to the above rule (and a will contest is probably an action *in personam*), in *United States v. 625.91 Acres of Land in Dunklin County, Mo.*, 49 Fed. Supp. 997. (E. D. Mo. 1943) in an eminent domain proceeding, District Judge Collet delayed the distribution of an award which had been made in the case before him until the outcome of the State Court will contest action. The court remarked in doing so (at page 1001):

> "While this court may not be deprived of jurisdiction merely by reason of the pendency of the will contest action in the State Court, the State Court has the right to proceed with that litigation without interference from this court, and the very fact that a different conclusion concerning the validity of the will might be reached in this court from that reached in the State Court with resulting conflicting judg-

ments and decrees relating to that portion of the estate involved in this action is sufficient to compel in the interest of comity, an abstinence of the exercise of jurisdiction by this court for such a reasonable time as to permit the expeditious adjudication of the validity of the will by the State Court and a recognition by this court of the conclusion there reached."

In the case at bar, we submit that Judge Westover might well have been under obligation to make an investigation and to exercise discretion of this character, for it would seem that an adjudication of a State Court on the rights of the respective parties would have been binding and material had the same been uttered prior to the ordered distribution of the subject award. In principle, there would seem to be no reason to differentiate in a case where the State Court had not reached its decision. It would appear most just to reserve from distribution the maximum sum for which Wynn has made claim until an ultimate decision has been reached by the California State Court inasmuch as it was Wynn, himself, who brought the State Court action for a determination.

Conclusion.

For the reasons set forth above, the judgment of Judge Westover should be reversed and the cause remanded to the District Court with instructions to make appropriate findings to the effect that the net balance of the award in the sum of $191,800.00 covers the interest of the lessee in both the Fletcher Lease and the Burns No. 1 Lease and should be distributed as follows:

To the Adamant Company:
25% of 3/7 of the net balance;

To Walter B. Scoville and his assigns:
19% of 3/7 of the net balance;

To Reconstruction Finance Corporation, as assignee of Treasure Company:
The remainder of the net balance, subject to a possible charge for such amount as may be found to be payable to Harry Wynn by reason of a decision of the State Court in the pending action.

Respectfully submitted,

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